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In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 113

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,

Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,

Respondents.

REPLY BRIEF OF PETITIONERS

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The Scheffer Press, Inc.—ANdover 3-6850

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REPLY BRIEF OF PETITIONERS

I. THE SEVENTH CIRCUIT'S OPINION IRRECONCILABLY CONFLICTS WITH THE CONTROLLING DECISIONS OF OTHER CIRCUITS.

Defendants concede the existence of a conflict among decisions with respect to the proper scope of the attorney-client privilege. Accordingly, defendants have sought to dismiss the cases adverse to their position as not well reasoned,[1] and devote much of their brief to the substan-

[1] Defendants argue that *Natta* v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968), should be rejected because "the validity of the 'control group' test was not an issue in that case." (Brief in Opposition, pp. 8-9). The premise for this argument is simply not accurate. Defendants have misled this Court by failing to advise that the appellees in *Natta* v. *Hogan* challenged the control group test as affording too broad a privilege, and placed its application squarely in issue before the Court of Appeals. (Appellees' Br., pp. 32-33, 35).

tive issues involved. The plaintiffs, of course, intend to present the merits of this case at the appropriate time.

The need to resolve the conflict that now exists in the federal system with respect to the proper limits of the corporate attorney-client privilege has become even more compelling because of the decision in *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 1970 CCH Trade Cases ¶ 73,122 (M.D. Pa., March 27, 1970), subsequent to the filing of this petition for certiorari. The conflict among the circuits appears quite sharply in *Honeywell* since Chief Judge Sheridan adopted the control group test, expressly relying on *Natta* v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968), and declined to follow *Harper & Row Publishers, Inc.* v. *Decker*, ... F. 2d ..... (7th Cir. 1970), noting the difficulties in trying to apply the Seven Circuit's test. The *Honeywell* opinion reasoned as follows:

> "Insofar as a corporation is concerned, only communications between counsel and the corporation's 'control group,' who are in effect *the clients*, are within the purview of the privilege. *Natta* v. *Hogan*, 10 Cir. 1968, 392 F. 2d 686. In determining what officers and employees of a company asserting a privilege speak for the company within the meaning of 'client,' the test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on advice of counsel, or is an authorized member of a group that has this power. *Natta* v. *Hogan*, supra. A research chemist and a group leader in a research and development department have been held not to be within the control group. *Hogan* v. *Zletz*, N.D. Okla. 1967, 43 F.R.D. 308, modified on other grounds sub nom. *Natta* v. *Hogan*, 10 Cir. 1968, 392 F. 2d 686. . . . One who claims the benefit of privilege should bear the burden to demonstrate that the privilege exists. *Camco, Inc.*

v. *Baker Oil Tools, Inc.*, S.D. Texas 1968, 45 F.R.D. 384. Plaintiff has not met this burden."

Thus, not only does the Seventh Circuit's opinion admittedly conflict with the law in the Tenth Circuit, and decisions of district courts in the Ninth and Second Circuits,[2] but the *Honeywell* decision reaffirms the vitality of the control group test enunciated in *City of Philadelphia* v. *Westinghouse Electric Co.* as the law in the Third Circuit.

The suggestion by defendants that these conflicts should be resolved by the Advisory Committee on the Rules of Evidence, subject to pressure from counsel wishing to change Rule 5-03(a)(3),[3] points up the need for this Court to exercise jurisdiction to consider and decide this issue. The supervision and control of the federal courts with respect to rulings on discovery and matters of privilege should be reserved to this Court, acting in the context of a fully litigated case.

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[2] A general recital of older cases applying the doctrine of corporate attorney-client privilege (Brief in Opposition, pp. 9-10) cannot obscure the fact that the federal courts, without exception, have applied the control group test to define the appropriate limits of the corporate attorney-client privilege since adoption of that test in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483 (E.D. Pa. 1962), petition for mandamus denied *sub. nom. General Electric Co.* v. *Kirkpatrick*, 312 F. 2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). Completely lacking any support in federal decisions, defendants place particular stress upon *D. I. Chadbourne* v. *Superior Court*, 388 P. 2d 700 (Cal. 1964). Yet that decision denied mandamus relief with respect to the trial court's discovery order and concluded that there was no showing that the statement of the interviewed employe "emanated from him in his capacity as a spokesman for the corporation" or that he spoke with any intention or expectation of confidentiality. (At 708-711)

[3] Brief in Opposition, p. 11.

II. THE EFFECTIVE ADMINISTRATION OF MULTI-DISTRICT LITIGATION UNDER 28 U.S.C. § 1407 REQUIRES THIS COURT TO RESOLVE THE CONFLICTS CREATED BY THE SEVENTH CIRCUIT'S OPINION.

The elimination of conflicts among the circuits as a reason for granting certiorari in this case takes on added significance in view of the disruptive effect that the Seventh Circuit's decision will have upon the special rules for consolidation and coordination of multi-district litigation under 28 U.S.C. § 1407. That statute provides:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . ."

Applying this statute, the Judicial Panel on Multi-District Litigation has held that "the pretrial powers of the transferee court include the powers to modify, expand, or vacate earlier discovery orders." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 489 (J.P.M.L. 1968). Section 1407 has been interpreted to require that all issues arising in pretrial proceedings be decided by the transferee court "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *Id.* at 491-492; *In re Antibiotic Drug Cases*, 299

F. Supp. 1403, 1405-1406 (J.P.M.L. 1969). The Judicial Panel has stressed this need for uniformity with respect to rulings on availability of evidence. *In re Plumbing Fixture Cases*, CCH Trade Cases ¶ 73,031 (J.P.M.L. 1970), pp. 88,035-88,036.

Consequently, the confusion created by the Seventh Circuit's opinion necessarily means that litigants in the numerous and growing number of multi-district antitrust and other complex cases, such as this one, will be subjected to different rules of law depending upon the district court before which their cases are consolidated for pretrial discovery purposes. Indeed, the parties may be precluded from essential discovery even though the control group test would be followed by the district court where the complaint was filed and where the case will ultimately be returned for trial.

Moreover, the existence of this conflict with respect to the scope of the corporate attorney-client privilege undermines the "just and efficient conduct" of multi-district litigation that Section 1407 seeks to achieve. The Judicial Panel's choice of forum to supervise and control pretrial discovery proceedings in multi-district cases should not be affected by the prospect of differences in crucial rules of law with respect to discovery.

III. DEFENDANTS' ARGUMENTS IN FAVOR OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE ARE NOT PERTINENT TO THE FACTUAL CIRCUMSTANCES OF THIS CASE.

The defendants have sought to gloss over the absence of any factual basis for their claims of corporate attorney-client privilege by an extended, hypothetical and irrelevant discussion of "public interest." The evidence of this

case demonstrates beyond any doubt that the debriefing interviews were conducted solely to gather facts as to what occurred before the grand jury during the pendency of that investigation. The attorneys involved did not render any legal advice to the witnesses interviewed about the conduct of their business or their corporation's business, but simply sought to discover what questions were asked in the grand jury, what areas of investigation were being pursued by the federal government, and who else had testified before the grand jury and the like. The fact that some of the witnesses interviewed may have been employees of the defendants did not change the purpose for which they were questioned.

Respectfully submitted,

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